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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 265

JOSEPH G. BERLIN,

Petitioner,

—against—

BARBARA F. BERLIN,

Respondent.

PETITIONER'S REPLY BRIEF

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The Respondent's brief displays a notable lack of care or fairness in the presentation of both law and fact. It seeks to obfuscate the issue by (a) suggesting non-existent issues, (b) misrepresenting facts and the Petitioner's argument, (c) ascribing erroneous holdings to judicial decisions and (d) insinuating the Petitioner's unworthiness as a father—all to the end of contriving a showing that this case presents neither an issue nor a petitioner deserving of this Court's consideration. A somewhat lengthy reply is unavoidable, and the Petitioner begs the Court's indulgence.

Three Critical Factors Warranting Review

Despite the Respondent's tactics, there remain intact three critical factors, among others, which commend this case for review, namely:

1. The modified Maryland decree awarding custody to the Petitioner is beyond attack for want of jurisdiction.

2. Maryland gives *res judicata* effect to its prior custody decrees, in the absence of proof of subsequent events which so alter circumstances as to require a custody change for the child's welfare.

3. In the case at bar, there is no proof of subsequent events which would impel the Maryland court to reverse its modified decree and award custody to the Respondent.

It is the convergence of these factors that presents the question heretofore unresolved by this Court, namely, whether the Full Faith and Credit Clause is violated by the refusal of one State to accord a foreign custody decree the same effect it would receive in the rendering state.

Respondent's Use Of This Court's Decisions

The Respondent's use of this Court's decisions merely executes the design of her "Statement" (Resp. Br., pp. 2-4) which, by a miscellany of answerable observations, innuendos and references, labors to suggest that this case is garden variety. Thus, her postulate of changed conditions inspires reliance on *Kovacs* v. *Brewer,* although she affirmatively declines to demonstrate the presence of appropriate facts in this record (Resp. Br., p. 7). Her subtle suggestion of a jurisdictional infirmity in the Maryland proceeding (Resp. Br., p. 2) leads to a distorted use of *May* v. *Anderson.* The assorted comments in her "Statement", whose relevance the Respondent fails to show, would seem to explain her citation of *New York ex rel. Halvey* v. *Halvey.* And finally, she ignores this Court's specific disclaimers and interprets the *Ford* and *Halvey* cases as holding that a custody decree must be given the same faith and credit that it would receive in the rendering state. The Petitioner wishes it were so, but this Court has twice noted that it has consistently reserved decision upon

that question. *Kovacs* v. *Brewer,* at page 607; *Ford* v. *Ford,* at page 192.

Kovacs v. *Brewer* merely held that a custody decree is not entitled to receive greater effect than it would receive in the rendering state, assuming the applicability of the Full Faith and Credit Clause. The case was remanded to the North Carolina Supreme Court for clarification of its decision, this Court stating that if North Carolina "properly" found changed conditions "decision of the constitutional questions now before us would be unnecessary" (at page 608). Obviously *Kovacs* v. *Brewer* did not hold, as the Respondent asserts, that a custody decree is not binding "irrespective of whether 'changes of circumstances' are objectively provable" (Resp. Br., p. 6). Her labored interpretation is a tacit admission of the absence of changed conditions here.

New York ex rel. Halvey v. *Halvey* did not establish a national rule that a custody decree is not *res judicata* as to facts not presented in the rendering state. It held only that New York could consider facts not before the Florida court *because* under Florida law the Florida court could do so. *Ford* v. *Ford* merely held that a Virginia order dismissing a *habeas corpus* proceeding to fix custody, entered solely as a result of a settlement between the parents, would not have precluded a Virginia court from reviewing the facts and circumstances at the time of the consensual disposition and, therefore, would not preclude the courts of South Carolina. Lastly, *May* v. *Anderson* did not hold that a litigant may twice litgate the jurisdiction of the rendering state, as implied by the Respondent. There, the jurisdiction of the rendering state was contested for the first time in the forum state, and this Court simply applied the settled rule that a state is not bound by a decree made without jurisdiction. The Respondent makes no attempt to

dispute the rule established by *Sherrer* v. *Sherrer* and other cases cited by the Petitioner (Pet., p. 8).

None of the foregoing decisions apply here—not *May* v. *Anderson,* because Maryland's jurisdiction has been contested and sustained; not *Ford* v. *Ford,* because Maryland law requires proof of changed conditions (discussed *infra*); not *Kovacs* v. *Brewer,* because the decision of the New York Court of Appeals here was plainly not based on proof of changed conditions within the meaning of Maryland law (discussed *infra*); and not *Ford* v. *Ford,* because the modified Maryland decree here was specifically based on investigation and the exercise of judicial discretion.

Respondent's Use Of Maryland Decisions

The Respondent has not attempted to discredit the authorities cited by the Petitioner in support of his statement of Maryland law requiring proof of changed conditions (Pet., p. 8). Rather she obliquely suggests the contrary, as did the New York Court of Appeals, by making the broad assertion that Maryland decrees are modifiable in Maryland (Resp. Br., p. 5).

The Respondent attempts to support her implication that Maryland will freely modify its decrees regardless of changed conditions by citing *Taylor* v. *Taylor,* 246 Md. 616 (1967), by which she hopes to dilute the specific decree here involved because of the reference in that case to the case at bar. The *Taylor* case did not rescind the established Maryland rule requiring changed conditions. Indeed, it supports the Petitioner. Relying on *Kovacs* v. *Brewer,* the Maryland Court of Appeals held the chancellor erred in construing the Full Faith and Credit Clause as depriving him of jurisdiction even to entertain an application for modification of a Carolina decree, where the application was supported by detailed allegations of changed

circumstances which, if proven, would have justified modification under California law.

It is indisputable, of course, that Maryland decrees may be modified in Maryland. But the question, so assiduously avoided by the Respondent, is: "Under what circumstances?". Maryland's view is well illustrated in the cases cited by Petitioner (Pet., p. 8), in particular *Winter* v. *Crowley* which held there must not only be proof of a subsequent change in conditions "to justify a change in custody", but the change "must be one affecting the welfare of the child and not of the parent" (231 Md. 323, 331). The statement of the Maryland Court of Appeals in this case that Respondent was not foreclosed from reapplying for custody "when appropriate" must be read in light of Maryland law requiring changed conditions, and not as a license to disregard the modified decree because of disagreement with its conclusion, as the New York courts and the Respondent have concluded. It is likewise necessary so to read the observation concerning the case at bar in *Taylor* v. *Taylor, supra,* quoted by Respondent (Resp. Br., p. 6).

The Respondent's other citations of Maryland authority are equally unavailing to her. In *Miller* v. *Miller,* 247 Md. 358 (1967), the Court held that the Full Faith and Credit Clause applied to a Florida custody decree. The Petitioner hereby adopts that case in support of his ultimate position here. The Respondent's citation of *Cornwell* v. *Cornwell, Winter* v. *Crowley,* and *Naylor* v. *Naylor,* all of which were cited by the Petitioner (Pet., p. 8), is explainable only as an effort to diminish their adverse impact on the Respondent. They do not remotely sustain the Respondent's statement that precedes them. Indeed, the *Cornwell* case made it clear that a Maryland decree may be modified only "should subsequent events justify it in the best interests of the children" (244 Md. 674, 680). *Winter* v. *Crowley* held the same, as discussed above. And

the *Naylor* case held a Nevada decree was *res judicata* as to facts which existed when it was made, and that Maryland was therefore bound to give that decree the same effect it would receive in Nevada, upon the authority of *New York ex rel. Halvey* v. *Halvey* and *Kovacs* v. *Brewer*.

The Respondent has quite evidently failed to rebut the Maryland requirement of proof of significant changed conditions.

Absence Of Proof Of Changed Conditions

Confronted by her inability to demonstrate proof of changed conditions in this record, the Respondent substitutes a feigned confidence and claims reliance upon alleged "findings of fact" by the New York Court of Appeals (Resp. Br., p. 7). In doing so, she overlooks the fact that the Court of Appeals has certified the Constitutional question was "presented and necessarily passed upon" (Appendix, page 11a)—a most puzzling conclusion by that high court, if the Respondent is correct, in light of the holding in *Kovacs* v. *Brewer*. She also forgets that the Court of Appeals lacked jurisdiction to find facts because of the Appellate Division's affirmance on the custody question,[1] and that neither the Appellate Division nor the trial court purported

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[1] N.Y. CONST., Art. 6, § 3; see also, CPLR 5501 (b); *Gluckstern v. Gluckstern*, 4 N.Y.2d 521, 523 (1958); *Harrington v. Harrington*, 290 N.Y. 126, 131 (1943). The Court of Appeals has jurisdiction to review facts only in capital cases, or where the Appellate Division upon reversing or modifying a determination finds new facts and makes a final disposition—N.Y. CONST., Art. 6, § 3; see also, CPLR 5501 (b). Even in such limited cases the Court of Appeals will not make a new finding of fact, but will merely adopt the finding of one of the lower courts which is supported by the weight of evidence. *Matter of City of New York (Coogan)*, 20 N.Y.2d 618, 623 (1967); *People Ex rel. MacCracken v. Miller*, 291 N.Y. 55, 61 (1943). In rare cases it may remand to the court of first instance for further findings. *Harrington v. Harrington, supra*, (custody case).

to find changed conditions within the meaning of Maryland law. However, her recourse to the judicial action in New York warrants some further scrutiny of that action.

The Petitioner has noted the origin and purpose of the New York proceeding (Pet., p. 5), and the proof and events at trial (Pet., pp. 6-7). The trial court's opinion made no mention of changed conditions, but merely recited that the award to Respondent would serve the boys' best interests (Appendix, page 20a). This was anti-climactic. From the outset and before hearing most of the proof, the trial court made clear its preference for the Respondent—a New York resident.[2] When the Full Faith and Credit Clause was urged as a defense, the court replied it was "not too much impressed with this business of giving full faith and credit"—attributing its reaction to an extrajudicial suspicion (unsupported by the record) that the modified decree was the result of judicial chicanery, Maryland style (85-86). In short, the trial court flatly impugned the integrity of the Maryland courts and, unconcerned by constitutional limitation, executed its early preference for the party of the forum. This is the core of the New York result, unadorned by even a pretext at finding changed conditions.

The Appellate Division likewise made no pretense of finding changed conditions under Maryland law. It merely noted several "relevant facts" and vaguely concluded "it should not be held" that the trial court erred (Appendix, page 16a). Not only are those supposed facts both unsupported

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[2] The trial had barely begun when the court interrupted testimony and pressed the Petitioner to accept a settlement "appetizing" to the Respondent, namely, that Petitioner consent to the vacatur of the Maryland decree and all prior contempt orders, and agree to the Respondent's custody (R.35-37). The trial court repeated these efforts at the close of the proof (R.75-76).

and irrelevant to the Constitutional question,[3] but the Appellate Division's emphasis on its erroneous analysis of the Maryland proceedings confirms that its decision was prompted by sheer disapproval of the Maryland determination, and by nothing more. Because the Respondent chooses to misrepresent the Petitioner's position as seeking reversal to punish her for contempt (Resp. Br., p. 7), the error of the Appellate Division's statement should be demonstrated.

The record in Maryland conclusively shows that the change in custody was no mere penalty for the Respondent's final contempt. Were it otherwise, the contempt order dated August 27, 1963 would have simultaneously directed the custody change. It did not. It only directed an investigation with respect to the Petitioner's request for custody (Exhibit "B", R. 108). The order changing custody was not made until two months later after the result of the investigation was reported to the court, specifically finding that a change in custody would serve "the best interests and welfare" of the children (R. 111). The Appellate Division's observation (abandoned by the Court of Appeals) not only impeached the Maryland record, but unjustifiably

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[3] (i) The statement that the Respondent was "authorized" under the divorce decree to remove the children to New York was a flagrant and untenable repudiation of the contrary holdings of the Maryland Courts which are *res judicata* (page 8 of Exhibit "A", R. 106; R. 116-117). (ii) The Respondent's remarriage took place before the Maryland modification (R. 22)—hardly a changed condition. Moreover, there was no proof of what their home life is like. (iii) The lack of an interview of the children in Maryland is of no moment in light of the Respondent's wilful refusal to participate in the Maryland proceeding. Also, awards of custody are made daily without consultation with young children. Finally, the children were not interviewed in New York although readily available (R. 47). (iv) At the time of the New York hearing the Petitioner was only "temporarily" residing in Washingon, D. C. (R. 54); there is no proof of a change in his Maryland domicile since that finding was made in Maryland (R. 117); and in any event his residence at the time of the New York hearing has no bearing on the Constitutional issue.

assumed the Maryland court breached its duty under settled Maryland law.[4] Although it cannot be gainsaid that the Respondent's repeated invasions of her sons' rights of visitation with their father prompted Maryland's re-examination of her fitness for custody, that circumstance hardly justifies the notorious disregard of Maryland findings, Maryland law and the presumption of regularity. The Appellate Division's statement was not only unsupportable, but it ignored the harmful effects on children of a mother's persistent denial of reasonable association with their father—a factor of manifestly proper concern to the Maryland court. Clearly, the Appellate Division merely arrogated the prerogative to disagree with the Maryland courts.

There is little necessity for detailed consideration of the Court of Appeals' statement that "no one could seriously argue that, given the time which has elapsed since the prior decree was rendered, the age of these children and the fact that they never had actually been out of their mother's custody, a New York court or, for that matter, a Maryland court should or would accept as binding the previous finding awarding custody to the father" (Appendix, pages 52-62). The youth of these boys and the Respondent's continuous custody were squarely before the Maryland court. The bare fact of Respondent's *de facto* extension of that custody while frustrating the Maryland decree, unaccompanied by *evidence* of intervening events bearing on the childrens' welfare, would hardly impel the Maryland court to reverse itself. The Maryland Court of Appeals specifically refused

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[4] Maryland law holds: "The overriding consideration in determining to whom the custody of a child should be awarded is, we have consistently held, the best interests and welfare of the child." *Wallis v. Wallis*, 235 Md. 33, 36 (1964); see, also, *Ferster v. Ferster*, 237 Md. 548, 550-551 (1965); *Glick v. Glick*, 232 Md. 244, 248 (1963); *Mason v. Mason*, 228 Md. 387, 389 (1962); *Griggs v. Griggs*, 228 Md. 539, 541 (1962); *Bray v. Bray*, 225 Md. 476, 481 (1961); *Hild v. Hild*, 221 Md. 349, 351 (1960); *Burns v. Bines*, 189 Md. 157, 162-163 (1947).

to do so, and the New York Court of Appeals' contrary suggestion without analysis of Maryland law is open to review. The decision of the New York Court of Appeals plainly rested upon its declaration of the inapplicability of the Full Faith and Credit Clause (Appendix, page 3a), as further indicated by its emphasis on discretionary recognition of custody decrees and its ultimate statement that the question, in cases of this type, is not whether a parent is estopped from *"re-litigating the issue"* (Appendix, pages 4a-5a) (emphasis added). In any event a mere recital of changed conditions could not be binding here (Pet., pp. 8-9).

It is inconceivable that the Maryland court would vacate the modified decree upon this record. To regard this record as involving changed conditions, while entertaining the fiction that the Full Faith and Credit Clause applies, is to make a mockery of the Constitution. [See comments of Mr. Justice Frankfurter in *Kovacs* v. *Brewer* (at pages 614-615)]. The mockery is particularly abrasive in this case where the jurisdiction of New York depends entirely upon the childrens' presence wrought by defiance of the modified Maryland decree, with the assistance of an *ex parte* New York stay.

Respondent's Attempt To Prejudice Petitioner

Perhaps in due recognition of her untenable legal position, the Respondent burdens the Court with a campaign to stigmatize the Petitioner as a man of callous indifference to his sons. In critical terms, she refers to his effort to obtain his sons under the modified Maryland decree, his inability to see his sons after December, 1962, and his failure to make support payments. Besides the irrelevance of her comments, they are unfair and easily answered.[5]

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[5] Not only is there no stigma attachable to the Petitioner's effort in September, 1963 to implement the Maryland decision, but the fact is that he relented when confronted by force (R. 57). His inability

The fact is the Appellate Division found that the Petitioner is a fit father, and that finding was sustained by the Court of Appeals.

The Respondent's tactics include an attempt to convey the impression that the Petitioner is not interested in custody, the statement being made that he sought only visitation at the trial (Resp. Br., p. 3). That comment is a distortion of a statement of counsel during lengthy colloquy at the trial, is rebutted by the record (Pet., pp. 7-8) and the common sense of the situation, and is finally discredited by the fact that the issue was litigated in all New York courts.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

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to see his sons was first caused by the Respondent's contemptuous interference with his right of visitation, and after the modified Maryland decree he was advised by Maryland counsel to avoid a repetition of the unpleasant September, 1963 encounter pending the decision of the Maryland Court of Appeals (R. 19). The Petitioner's failure to pay support was directly caused by the Respondent's contempt, as a result of which the Maryland court made an order suspending his support obligation on March 27, 1963 (Exhibit "B", R. 108).